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In the

Supreme Court of the United States.

REPLY BRIEF OF DEFENDANTS IN ERROR.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1898.

OLIVER O. FORSYTH, Administrator of the Estate of Jacob Forsyth, Deceased,
Plaintiff in Error,

vs.

HENRY F. T. VEHMEYER,
Defendant in Error.

Error to the Supreme Court of Illinois.

REPLY BRIEF OF DEFENDANT IN ERROR.

I. No Federal Question Involved.

The hearing of the motion made by the Defendant in Error to dismiss the writ of error in this case having been postponed by the court until this case should be reached in its regular order, counsel for the Defendant in Error, Henry F. T. Vehmeyer, respectfully submits his reply to the brief heretofore filed by the plaintiff in error.

The argument of the opposing counsel in the brief referred to is apparently based upon an erroneous hypothesis. It is to be remembered that this writ of error is

not prosecuted from a judgment of a state court which finds that the plaintiff in error was guilty of fraud which barred him from a discharge in bankruptcy. The action is one of *debt upon a judgment*, in a case in which no question of bankruptcy arose, and which judgment was never appealed from, and has never been attacked during its existence by the plaintiff in error. If that original judgment had been erroneous, and if the plaintiff in error was injured thereby, he had his legal remedy which could have been asserted at any time within five years after the date of that judgment. But this was never done, and, presumably, for good reasons.

The sufficiency of the evidence upon which that judgment was founded, the correctness and formality of the pleadings, and all other questions as to possible errors which may have been made in the original trial of that case are not subjects for consideration in this case. The plaintiff in error has been insisting upon the defendant in error re-trying that original case, ever since this suit upon the judgment in that original case was begun ; and the argument in his voluminous brief revolves about this erroneous idea. It would probably be impossible for the defendant in error after the lapse of these twenty-nine years to prove by witnesses his original cause of action. Certainly the law does not require of him any such proof.

It was only incumbent upon the defendant in error to prove upon the trial of this case that a judgment had been rendered against the plaintiff in error, in an action on the case for fraud and deceit; and incidentally that process of *ca. sa.* for his arrest issued upon the judgment in that case; and that the judgment had never been satisfied or annulled. An inspection of the transcript of record filed in

this case makes it manifest that the defendant in error proved all this by an abundance of evidence, and that the various appeals taken from that judgment have been upon mere technicalities, without one trace of merit, and for the purpose of wearing out the defendant in error and delaying justice.

This court would unquestionably have jurisdiction in this case if this were an original action against the plaintiff in error for a debt which was founded on fraud and claimed not to have been discharged by the Bankruptcy Act of 1867. In other words, if the plaintiff in error had set up discharge in bankruptcy as defense in the original suit, and had appealed from the *judgment in the original suit*, and had taken the cause finally before this tribunal, there would be no question of jurisdiction. But this is an action upon a judgment which has been found by five successive Illinois tribunals to have been rendered in July, 1871, against the plaintiff in error, for fraud and deceit in an action on the case. And we again submit that there is no Federal question involved in this case, but merely a question of fact which has long been decided—and properly.

In the case of *Newport Light Company* v. *Newport*, 151 U. S., 527, it is held that the Supreme Court of the United States must determine for itself whether the suit really involves any Federal question which will entitle it to review the judgment of the state court under United States Revised Statutes, section 709, although the state court certifies that such a question is involved.

If the decision of a Federal question by a state court is rendered unnecessary by the view which the court properly takes of the case within the scope of the pleadings, the

judgment is not open to review in the United States Supreme Court.

Chapman v. *Crane*, 123 U. S., 540.
Wells v. *Crane*, 150 U. S , 84.
Eustis v. *Bolles*, 150 U. S., 361.

It is submitted that this judgment of the Illinois Supreme Court was not based upon the fraud of the plaintiff in error, and did not involve that question. It decided merely that the trial court made no error in determining, from all the evidence before it, that the judgment which is the foundation of this suit had previously been rendered by the Superior Court of Cook County, Illinois, against the plaintiff in error in an action *ex delicto*, and remains in full force. If there had been an appeal or writ of error to this tribunal from that original judgment, the problem before this court would have been of a very different nature. But it is submitted that the Supreme Court of Illinois did not decide a Federal question when it sustained the finding of the trial court that the judgment of a certain kind had previously been rendered in the Superior Court of Cook County, Illinois. And if the Supreme Court of Illinois based its judgment upon this ground, even though it was erroneous, the United States Supreme Court will not take jurisdiction.

De Saussure v. *Gaillard*, 127 U. S., 216.

Here it might be well to call the attention of the court to the declaration in the original case, the contents of which are given in the testimony of the witness Frake and reproduced upon page 3 of the brief of plaintiff in error. [There is a slight misprint in the brief referred to. In the first line of the declaration the witness uses the word "plaintiff," and not "complainant," as there printed

in italics. See Trans. of Record, p. 27. Also in the sixth line from the bottom of said declaration, after the word "to" should be inserted the word "sell"; see Trans. of Record, p. 28.] The witness gave this declaration from memory, but testified that in the original he used the form books, Puterbaugh's Common Law Pleading and Chitty's Pleading. (Trans. of Record, p. 26.) He stated the substance of a good declaration, and one upon which a judgment in case could be founded; and the other testimony of the defendant in error, introduced at the trial (Trans. of Record, pp. 22-45), clearly established that such a judgment was rendered. The form of that original judgment, the subsequent proceedings, the arrest, etc., were questions of fact to be determined by the credibility of witnesses and all the circumstances in the case; and have been settled by the trial court and by the Illinois Appellate Court. The law in the case has never been in doubt, and all of these matters referred to above are *res adjudicata*.

In the case of *Clark* v. *U. S.*, 6 Wall., 254, it was held that a question of fraud or mistake is one of fact, upon which the finding of the court below is conclusive in this court.

The question of fraud in a court of law is a question of fact for the jury, under the instructions of the court.

Warner v. *Norton*. 20 How., 448.

Gregg v. *Sayre*, 8 Pet., 244.

Where the court below in an equity action, on a full consideration of all the proofs, came to a conclusion on a question of fraud, this court will concur with the court below, although the evidence raises some doubt.

Parker v. *Phetteplace*, 1 Wall., 684.

If the finding of facts by a jury, or by the court below, is conclusive in the State Supreme Court, the same will be held conclusive in the Supreme Court of the United States.

Republican River Bridge Co. v. *Kan. Pac. R. R. Co.*, 92 U. S., 316.

In order to bring this case within the purview of section 5117 of the Bankrupt Act, it is only required that the debt should be created by fraud.

Hinckley v. *Lewis*, 45 Ill., 327.
Mathews v. *Cowan*, 59 Ill., 342.

In the case of *Warner* v. *Norton*, 20 How., 448, in considering a question of fraud, the court say: "Few "questions in the law have given rise to a greater con- "flict of authority than the one under consideration. "But for many years past the tendency has been to con- "sider the question of fraud as a fact for the jury, "under the instructions of the court; and the weight of "authority seems to be now in this country favorable to "this position."

In the case of *Republican River Bridge Co.* v. *Kan. Pac. R. R. Co.*, 92 U. S., 315, which was referred to above, Mr. Justice MILLER says: "The finding by the "District Court was received by the Supreme Court of "the state (Kansas) as conclusive as to all facts in issue, "and it is equally conclusive upon us. * * * In "cases where the facts are submitted to a jury and "are passed upon by the verdict, in a common law ac- "tion, this court has the same inability to review those "facts in a case coming from a state court that it has in "a case coming from a Circuit Court of the United "States. This conclusiveness of facts found extends to

"the finding of a state court to whom they have been "submitted by waiving a jury, or to a referee, as well "as the verdict of a jury." Citing *Merad Mining Co.* v. *Boggs*, 3 Wall., 304, and *Crary* v. *Drolin*, 92 U. S., of the same term.

And although we recognize that this court would have jurisdiction in this case if this writ of error were prosecuted from an *original* action against the plaintiff in error, involving a question of discharge in bankruptcy, as before stated, we submit that an inspection of this record, including the opinion of the Illinois Supreme Court in this case, and the grounds upon which it based its judgment, will satisfy this court that under the peculiar facts of this case there is no Federal question involved, and that this writ of error should be dismissed for want of jurisdiction, or affirmed, in accordance with the motion of the defendant in error pending before the court.

* * *

II. Judgment of Ill. Supreme Court Right.

But if this court should be of the opinion that it has jurisdiction in the case, it is submitted that upon the merits of the suit the defendant in error is entitled to have the judgment below affirmed in this court, and that the judgment of the Illinois Supreme Court was in accordance with law and overwhelmingly sustained by the evidence.

The essential inquiry is whether or not any substantial and reversible errors of law were made by the Illinois courts; and whether the Bankrupt Act of 1867 ever intended to discharge a person from a judgment such as is here sued upon.

Erroneous Contentions.

In the court below one of the principal points contended for by plaintiff in error was, that oral evidence could not be admitted to establish the contents of a lost or destroyed record of judgment, but that the record of such judgment must first be restored in the manner provided by statute. The Appellate Court of Illinois and the Illinois Supreme Court have decided, in accordance with the settled law on that subject, that parol evidence is competent for that purpose. (See opinion in this case, Trans. of Record, pages 91–96.)

Another principal contention in the courts below, and in this court, was for the right of plaintiff in error to try over again, upon new evidence, the facts in controversy in the original case, in which the judgment sued on was rendered, for the purpose of seeking to prove that there was no fraud on the part of the defendant in the

transaction in controversy in the original suit. The Illinois Supreme Court has, in a few words, conclusively decided against that contention. Counsel for plaintiff in error, who were not connected with the former trial or appeal, in utter disregard of the opinion of the Illinois Appellate Court (55 Ill. App. Court R., 223), sought to again introduce such evidence on the second trial; and are here vigorously making the same contention on that point. It will be a sufficient answer to much of what is contended for in plaintiff in error's brief to refer to the decision already rendered in this case.

Issues in the Case.

The issues made by the pleadings in this case present two clear and simple questions: First, was there such judgment rendered by the Superior Court of Cook County, July 29, 1871, as the plaintiff alleges; and, secondly, was the plaintiff's recovery therein upon such a cause of action that the defendant, Forsyth, was not discharged from that indebtedness by his subsequent discharge in bankruptcy? The plaintiff below maintained the affirmative of both those issues by proof so conclusive in this record as to admit of no serious question.

Proof of the Judgment Conclusive.

The fact that there was such a judgment rendered as is alleged, and the essential contents of the lost record thereof and of the files therein were fully proven by competent evidence. The law is well settled that when it is proved or conceded that the record of the judgment sued on is lost, secondary parol evidence of the former exist-

ence and contents of the judgment record will be admitted. It is so held in the former decision of this case.

Forsyth v. *Vehmeyer*, 55 Ill. App., 223.

See, also,

13 Am. & Eng. Encycl. of Law (Topic, Lost Papers), p. 1156.

Freeman on Judgments, §§ 407 and 432b.

Abbot's Trial Evidence, p. 538.

Ashley v. *Johnson*, 74 Ill., 392.

Mandeville v. *Reynolds*, 68 N. Y., 528-538.

Renner v. *P. D. & Co. Bank of Col.*, 9 Wheaton, 581.

The statutory method of restoring such records does not exclude such proofs.

Mobley v. *Watts*, 98 N. C., 284.

Clifton v. *Fort*, 98 N. C., 173.

The secondary evidence offered by defendant in error in this record was competent and conclusive proof of all his allegations in relation to the judgment record in question. The testimony of Mr. Frake shows a clearly remembered and accurate personal knowledge of everything that occurred in the original suit from its commencement, and of the substantial contents of the record. His entries in his office docket, made at the time of the proceedings, bear out his recollection. He had examined the entry of the judgment in the judgment record carefully with the clerk of the court when he applied for a writ of *ca. sa.* for the purpose of arresting the defendant; and he gives its substantial contents, as well as the substance of the verdict. The testimony of this witness alone was complete proof

of plaintiff's allegations in issue in this suit, in the absence of any countervailing testimony. (Trans. of Record, pp. 22–33.)

But for greater certainty, defendant in error also introduced an abstract of the judgment record in question from the books of Chase Bros. & Co.—an abstract made in the course of their business of compilers of abstracts of title, which are legal evidence of the matters so shown. Mr. Stevens establishes the verity of that abstract by his testimony that he personally made the abstract and obtained the contents of it by personal examination of the files, minutes, orders and records of the court, his entries being verified by subsequent comparison with the written record. (See Trans. of Record, p. 34, and testimony of Stevens, pp. 33–43.)

The plaintiff in error also contributes to the evidence another abstract of the judgment record according to the abstract books of Shortall & Hoard, inserted at page 39 in transcript of record. While this was intended to raise some doubt as to the form of the action, it fully corroborates the proof that there was, and in legal contemplation still is, of record in the Superior Court of Cook County, Ill., such judgment as is alleged in plaintiff's declaration.

Counsel for plaintiff in error contends at great length that the declaration in the original suit, as testified about by the witness James Frake, lacked the *scienter* averment and was otherwise technically defective as a declaration in an action for fraud and deceit. And this is urged as part of his contention that plaintiff below failed to make proper proof of the judgment record sued on. This evidence was not offered by plaintiff as part of his proof of

the record of the judgment sued on, but upon the issue that the judgment was for such fraud of the defendant, that the judgment was not affected by discharge in bankruptcy. The proof was intended to show, and did show in substance, that the issues in the original case presented a material allegation of actual fraud as the foundation of the suit in which the judgment was obtained. The evidence did not pretend to furnish the exact language or formal parts of the declaration.

Counsel vigorously assails the supposed defects in the declaration in that original case, and argues that the judgment which was recovered could not or should not have been had upon such a declaration. But that contention, if of any value, should have been made in that case. It comes too late here. Counsel's supposed grounds of demurrer to that declaration, or of motion in arrest of that judgment, or assignment of errors to that judgment, will not be considered in this case. All those matters are *res adjudicata*. The verdict and judgment in that original case cured all such defects as counsel claims were in plaintiff's declaration therein, if any existed.

When there is any defect, imperfection or omission in any pleading, whether in *substance* or *form*, which would have been a fatal objection upon demurrer, yet if the issue joined required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict.

Keegan v. *Kinnare*, 123 Ill., 280, 292.
1 Chitty's Pleadings (7th Ed.), pp. 711, 712.

If no motion is made in arrest of judgment, Sec. 6 of Revised Statutes of Illinois, on Amendments and Jeofails, prevents a reversal for any mispleading, insufficient pleading, etc.

Barnes v. *Brookman*, 107 Ill., 317-321.

THE DISCHARGE IN BANKRUPTCY NO BAR.

The remaining contention of plaintiff in error is his alleged discharge in bankruptcy, pleaded in bar of the judgment debt; to which defendant in error replies and makes proof that the judgment was based on the fraud of pefendant, and the debt was for that reason not barred by discharge in bankruptcy.

Discharge in bankruptcy as a defense is not meritorious, but *stricti juris*. The bankruptcy law was intended as a relief for *honest* debtors only. As a condition precedent to the discharge, the fullest truthfulness, honesty and good faith was required of the applicant in disclosing and surrendering all his assets, and in scheduling only his just liabilities, so that all his property might be fairly applied upon payment of all his honest debts. And the law rigidly prohibited him from obtaining discharge from any liability created by his fraudulent conduct in overreaching his fellow-man by deceit, falsehood or sharp practice.

The bankruptcy law, under which appellant sought shelter, does not discharge the bankrupt from a debt created by fraud.

U. S. Bankruptcy Act, Section 5116.
Bump on Bankruptcy, 741.

While it is true that judgments are among the class of debts provable and dischargeable in bankruptcy, the mere reducing such a claim to judgment does not convert it into a dischargeable debt. The record may be looked into, and if it shows a material and traversable allegation of fraud as its sole foundation, the debt may be fairly said to be founded on fraud, and from it the bankrupt's discharge will not release him.

Although the original ground of action may have originated in a contract undertaking, and the plaintiff might have elected to waive the tort and base his claim on the contract, he was not bound to do so. And when, as in this case, the debt was contracted by means of fraudulent representations of the seller, which were relied on by the purchaser and induced the sale, the injured party may sue in tort to recover his damages occasioned by the fraud and deceit in the transaction, and thus secure a more effective process for the enforcement of his recovery; and to such a recovery a discharge in bankruptcy will not be a bar.

Bump on Bankruptcy, pp. 742, 743, 753.
Eden on Bankruptcy, 110.
Horner v. *Spellman*, 78 Ill., 206.
Warner v. *Cronkhite*, 6 Bissell, 453, which is

particularly cited as presenting a clear statement of the law and review of the authorities on the question.

See, also,

Reid v. *Martin*, 11 N. Y. (S. C.), 590.
Hughes v. *Oliver*, 8 Penn. St., 426.
Field v. *Berlitzheimer*, 9 Bradwell, 465.
First National Bank v. *Burket*, 101 Ill., 392.

The contention of counsel for plaintiff in error that the "fraud" contemplated in the bankruptcy law means actual, positive fraud, involving moral turpitude or intentional wrong, is fully conceded; and the declarations of law to that effect proposed by him on the trial below were all given by the court. (See Transcript of Record, pp. 80-81.)

The finding of the court upon the evidence was entirely consistent with those declarations of law.

Appellant, on the trial below made, and in this appeal persists in, the futile contention that the facts relating to the original cause of action and in controversy in that case should have been retried in this suit upon such amended testimony as the defendant may now muster up. Appellant sought on the trial below, just as had been attempted on the first trial of this case, to open up the merits of the original controversy, and to show that the original recovery, in an action on the case for fraud and deceit, was not right and not sustained by the facts in the case as he now offers to prove the facts to be. The exclusion of this evidence is insisted on by appellant as error.

The evidence so offered was properly excluded. It is so expressly decided in this case, as reported in 55 Ill. App., 223; and no other authority need be cited. The merits of the original controversy, upon the facts as well as the law involved, are conclusively and finally settled by the judgment therein; and whether the finding in that case was right or wrong, the facts could not be tried over again in this case; and that judgment cannot be reviewed in this court. If any error was made which worked injustice to plaintiff in error in that case, he had his remedy by appeal or writ of error. But as he did not see fit to

pursue such remedy it is too late to seek in any court to avoid the effect of that finding and judgment.

The question in this case as to the form of action and the matters which were in controversy and determined by the judgment in the original case, *can only be tried by the record in that case;* and it must be decided by the proof of what that record was. Evidence *aliunde* cannot be considered The settled rule, as stated in *Warner* v. *Cronkhite*, is that if "the record of the action shows a material and traversable allegation of fraud as the sole foundation of the action, the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge will not release him."

See, also, 20 Am. and Eng. Encyclop. of Law (Topic, "Record"), p. 499, note 1, and cases cited.

The proof in this case as to what the original record disclosed upon that point is all one way. The evidence on the part of the plaintiff is uncontroverted that the original action was in form *ex delicto*, based on the fraud and deceit of defendant; that the declaration, containing but one count, avers in substance, as the sole ground of the action, that defendant made to the plaintiff certain false and fraudulent representations as to existing facts which are set forth; that the alleged false representations were made for the purpose of inducing plaintiff to advance to defendant a large sum of money, as stated; that the plaintiff, relying on those false representations, was so induced to advance, and did advance to defendant, the alleged sum of money; that the alleged representations as to the existing facts (about defendant owning or having 200 cords of

wood ready to be shipped to Eldridge under his contract with Eldridge) were false when made, and no such pretended arrangement with Eldridge existed or was ever carried out; and that defendant, by such false representations and deceit, defrauded plaintiff of the money he was so induced to advance defendant, and thereby damaged him to the amount laid in the declaration.

The evidence shows that defendant joined issue upon those averments in a plea of not guilty; that the case was tried upon evidence offered upon that sole issue, and a verdict rendered finding the defendant guilty on the issue joined, and assessing plaintiff's damages at $833.35; upon which the judgment here sued on was subsequently rendered by the court, and duly entered in the judgment record. This is all conclusively shown in substance by the testimony of Mr. Frake. Notwithstanding the frantic effort of defendant's counsel on the trial to confuse the witness by interruptions and objections, his clear recollection of the case leaves no doubt that the material averments in issue in the original suit, and its sole foundation, were the allegations of the fraud and deceit of the defendant. (See Trans. of Record, pp. 22-33.) It is manifest that no judgment at all was recoverable in that action except upon the issue of fraud.

Further proof from the record in the original case, that the issue was the fraud of defendant, is furnished by the admitted fact that a writ of *capias ad satisfaciendum* was afterwards issued upon that judgment and the defendant arrested thereon by the sheriff and committed about October, 1871. The judgment upon the cause of action stated, and about which both parties agree, must necessarily have been in an action *ex delicto*, for fraud and deceit; other-

wise that writ could not have issued. If the recovery was in assumpsit, upon contract liability, there could have been no arrest of defendant under a *ca. sa.*

The offer by plaintiff in error of evidence to the effect that defendant was discharged from arrest in the original action by the County Court, upon making schedule under the insolvent debtor's act, was properly excluded by the court below as incompetent and not admissible under the pleadings. The ruling is held to be good in the opinion in this case, cited in 55 Ill. App., 223. The more reliable testimony as to those proceedings in the County Court, introduced by defendant in error without objection, shows that an application was made to the County Court by the defendant Forsyth, after his arrest, to be discharged as an insolvent under the Illinois Insolvent Debtor's Act, and pending that application the case was continued, and the defendant released on bail with leave to present a schedule at the next hearing and to establish if he could his right to be discharged. The great fire destroyed all records before the time set for that adjourned hearing, and the schedule was never presented. (See Trans. of Rec., p. 77.)

The additional plea filed by appellant, and to which a demurrer was sustained, presented an immaterial double issue which was good neither as a plea in bar nor in avoidance. It was wholly immaterial to this case whether the County Court discharged Forsyth from arrest or not. If he had been so discharged, that would not have satisfied or discharged or in any way affected the original judgment. The decree or order of the County Court surely cannot have the effect to reverse or annul the judgment of the Superior Court, or change the issues or

the findings in that court, as seems to be set up in the rejected plea.

Further corroboration of the proof from the record, that the issues in the original suit were those of an action *ex delicto*, is furnished by the abstract of the judgment record in question, taken from the books of Chase Bros. & Co., and the testimony of Mr. Stevens as to the sources from which that abstract was compiled. (Trans. of Rec., pp. 33-43.) This evidence is very convincing proof that the original action in question was an action on the case. Mr. Stevens personally examined the *præcipe* and pleadings in the case as they were filed. And that the suit was in form *ex delicto* was known from his personal inspection of the papers, and he was not likely to be mistaken. The other abstract from the books of Shortall & Hoard, which was offered by appellant to raise doubt as to the form of the action, has comparatively but little weight as evidence. It is not shown from what sources the contents of that abstract, as relates to the form of the action, were taken; nor whether it was derived from the files in the case or correctly represents the contents of the files. (See testimony of Marshall Waite, Trans. of Rec., pp. 72, 76.)

This bit of testimony is the only evidence in this case, on the part of plaintiff in error, that is opposed to the complete and conclusive proof on the part of defendant in error, making it manifest by the record in the original case that the gist of that action, and the sole foundation for recovery therein, was the allegation of actual fraud on the part of plaintiff in error, as claimed in our replication. And we submit that the finding upon that issue is sustained by this record.

This case discloses neither a meritorious nor technical defense to a just indebtedness, and the evidence taken as a whole establishes a judgment from which the Bankruptcy Act was never intended to discharge the debtor.

We respectfully submit that the judgment of the Illinois Supreme Court should be affirmed.

JOHN S. MILLER,
Attorney for Defendant in Error.

M. W. ROBINSON,
Of Counsel.